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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919

No. 482

THE UNITED STATES OF AMERICA EX REL. MILWAUKEE SOCIAL DEMOCRATIC PUBLISHING COMPANY,
Appellant.

vs.

ALBERT S. BURLESON, POSTMASTER GENERAL OF THE UNITED STATES,
Appellee.

APPELLANT'S BRIEF AND ARGUMENT.

The facts in the pleadings show that said relator is a daily newspaper published in the City of Milwaukee, Wis., and has been for many years past; that it has a circulation in excess of thirty thousand (30,000) copies, of which about nine thousand (9,000) circulate through the mails; that its circulation extends throughout the United States; that it is absolutely necessary that the use of the mails as second-class mail matter should be preserved to said newspaper, if it is not to be commercially destroyed; that said newspaper is owned by about twelve thousand (12,000) stockholders; that said newspaper circulated uninterruptedly until it received the letter from the Postmaster of the City of Milwaukee informing said relator that said Postmaster had been directed by the Postmaster General of the United States to exclude said newspaper from the use of the mails as second-class mail; that on the day designated for the pretended hearing before the Postmaster General, Victor L. Berger, Managing Editor of said newspaper, made the following offer:

> "If it is necessary for the existence of the *Leader* to keep—to change my policy, I will do that. I owe it to them who have put their money into it. I believe in these principles, but if you think it is necessary; that our country will be harmed; that our Government will suffer, if I continue on

these lines—on this line of editorials, I will give them up." Respondent after the reading of certain printed articles declined to specify or indicate upon request which of said articles violated any provision of said Espionage Act, and what particular section of said Act, merely generally declaring that "the tendency of the paper is seditious." We have then an admitted state of facts, save that the respondent denies that he declared the offense as indicated by general tendency of the paper to be seditious. We have, moreover, the admitted fact of irreparable injury, unless relief can be had by the writ prayed for.

INVOLVES A FUNDAMENTAL RIGHT.

COURT WILL REVIEW ACT OF ADMINISTRATIVE OFFICER.

The general body of the Constitution of the United States provides for the organization of the Government into three distinct divisions: the legislative, executive and judicial; upon the respective branches, the federation of States, conferred certain powers and invested them with certain clearly defined responsibilities. In the unfolding of the process of government each repository of this delegation of power has guarded such powers against invasion with tolerant but firm jealousy. After agreement upon the text of the Constitution there were passed the first group of the articles of declarations of rights, and in the First Amendment, the first article of the bill of rights, appear the guaranties against invasion of the freedom of religion, the right to petition and assemble, and the abridging of the right of free speech and of a free press. The guaranties appearing in the bill of rights, proclaim the fundamental rights, the shelter and protection of the Constitution, the most solemn responsibility of the judicial branch of the Government. Section 8 of Article 1 of the Constitution provides in the general empowering section to Congress, among other powers the power to "establish postoffices and postroads." This power is not granted to Congress as an isolated grant, distinguished from the other general grants of legislative power; it is but ***one of the numerous*** designated powers conferred by that section. In the exercise of its power, Congress has not only created a system of postoffices and post-

roads, but has created a Land Department, a Patent Department, a Military and Naval Department, and various other departments of the Government, all of which in the administration of their respective jurisdictions deals with rights of the citizen. In the administration of the various departments there arises a multitude of casual and incidental questions, all touching in some relation the liberties and the property of the citizen. There have always been certain property rights determined by the various departments which in the exercise of the legislative or executive power were of that character ordinarily occurring in the administration of the business of government, out of which from time to time citizens claiming to be aggrieved have invoked the power of the judicial branch of the Government, claiming such administrative action deprived them of property without due process of law. Wherever the judicial power has been invoked on such appeal from the action of the administrative officers, the courts have recognized as a matter of ***practical conveniences*** the desirability of declining to interfere ***unless such decision concerned a fundamental right of the citizen or showed a manifest violation of the rights of the citizen.*** The rule has been variously stated. Generally it has been declared by the courts that they will not interfere with the action of an administrative officer in the exercise of a power delegated to him by Congress, unless such action by the administrative officer is ***ministerial,*** as distinguished from the act of an administrative officer which involves the exercise of a ***discretionary*** judgment. This rule of practicable convenience has been essential to save the judicial branch of the Government from being harassed with innumerable casual and private matters.

It is to be observed, however, that in all of the appeals from the acts of administrative officers, while the judiciary has with a generous tolerance declined to interfere, as above indicated, yet throughout the cases involving the respective functions of the judicial or legislative branch, a zone of governmental action of the most sensitive importance, the courts have, despite the declaration of this rule of ***practicable convenience,*** invariably reviewed the facts or the mixed questions of fact and law upon which the decision of the administrative officer rested, and not

infrequently have reversed the action of such administrative officers.

Hoover v. McChesney, 81 Fed. 472.
School of Magnetic Healing v. McAnnulty, 187 U. S. 94.
Payne v. Nat'l. Ry. Pub. Co., App. D. of C. 581.
Ex Rel. Garland, 4 Wall 333.

In the administration of the Postoffice Department there have been involved questions arising under the acts of Congress: 1st, as to the right of admission to the mails, or the exclusion from the mails *generally;* 2d, cases as to the right of admission to the mails or exclusion from the mails in the different postal *classifications*, i. e., first, second and third. These have arisen under the statutes, declaring to be non-mailable matter containing lottery advertisements, or in furtherance of fraud, or as to matter containing certain physical disqualifications for proper admission to mail privileges, or to determine whether certain publications complied with the requirements of the statute admitting to special postal rates.

Following are collated cases which embrace classifications of mail which have become the subject of judicial review:

Ex Partee Jackson, 96 U. S. 727; lottery advertisement.
Ex Rel. Rapier, 143 U. S.; lottery.
Enterprise Sav. Assn. v. Zumstein, 67 Fed. 1000; lottery.
Dauphin v. Key, McArthur & Mackay, 203 D. of C.; lottery.
Mo. Drug Co. v. Wyman, 129 Fed. 623; vitality pills.
School of Magnetic Healing v. McAnnulty, 187 U. S. 94; medical treatment.
Hoover v. McChesney, 81 Fed. 472; lottery.
Bates v. Payne, 194 U. S. 106.
Houghton v. Payne, 194 U. S. 88; serial novels.
Payne v. Nat'l Ry. Pub. Co., 20 App. D. of C. 581; whether time tables are periodicals within right to second-class postal rates.
Fairfield Floral Co. v. Bradbury, 89 Fed. 393; fraudulent scheme to market artificial flowers.

Considering these decisions collectively, it is apparent that judicial review was invoked in behalf of what was essentially a

matter of ***private*** consequence, involving facts of ***obvious*** import, where there was no semblance of the invasion of a fundamental right, of broad public consequence—most of them sought in behalf of a business, sordid in nature. Yet again taking these decisions collectively, it appears that in the McChesney case, the McAnnulty, and in Pub. Co. v. Payne, the action of the administrative officer was reversed, and it is significant that in every one of these cases, whether reversed or whether the court declined to interfere, there was a review of the facts, or questions of law and fact. It is true that in the Zumstein case and in several others, it is held that where Congress has delegated power to the administrative officer to administer the execution of its powers, it is dogmatically asserted that the decision of the Postmaster General in that behalf upon questions of fact is final, and that even where questions of law, or mixed questions of fact and law are determined by the Postmaster General, there is a strong presumption of its correctness. This doctrine finds its strongest expression in Bates v. Payne, 194 U. S. 160, which uses this language:

> "There is a strong presumption of correctness even upon mixed questions of law and fact, and courts will not ***ordinarily*** review it, ***although they have the power and sometimes do.***"

In the case of ***Dauphin v. Key, McArthur & Mackey, 203, D. of C.,*** while thecourt declinedto interfere with the action of the administrative officer, it did so upon the ground that the Fifth Amendment to the Constitution guaranteeing due process of law, "refers to the fundamental rights referred to in the Constitution and not applicable to mere privileges of legislative creation."

So in Public Clearing House v. Coyne, 194 U. S., 497, Justice Brown, in sustaining the action of the Department, says: "If the ordinary daily transactions of a department had to be reviewed * * * the courts would be over-burdened." But in that same decision the court recognizing as heretofore suggested, that through the cases runs this rule of ***practical convenience,*** is on the assumption "that there may be judicial review if wrong is done," a relief manifestly impossible in the instant case, where

irreparable harm is done to the relator. In that same case, quoting the case of Noble v. Union River Logging R. R., 147 U. S. 165, the Court while asserting the rule, indicates that it relates only to harassing and obstructive process in matters of daily transactions, saving in the language of that decision also the judicial right of review by declaring that there may be judicial relief later, and indicates that relief was denied for that reason. The Court further says that it is moved to the rule laid down, "provided there be reserved ultimate recourse to the judiciary."

That the power of the Postmaster General is not free of review is further evidenced in School of Magnetic Healing v. McAnnulty, supra, where after stating that the power of the Postmaster General is the absolute power to make judgments, declares the right of court review where the judgment made by the Postmaster General is wrong in relation to the facts as matter of law, using further this language:

> "The fraud statutes were not intended to cover cases in which the Postmaster General might regard as based on false opinions, but only cases of actual fraud in regard to which opinions formed no basis";

and holds in substance that unless the question may be reduced to one of fact as distinguished from mere opinion, the courts will grant relief.

USE OF THE MAILS IS A VALUABLE RIGHT—A PROPERTY RIGHT.

Again taking the cases collectively as they have developed, the declination of the courts to interfere with departmental decisions has been justified, arguendo, by the phrase characterizing the right to the use of the mails as a privilege which Congress confers through its delegated officers upon the citizen, and which could by the same token be withdrawn from the citizen. This position has been forcibly disapproved in Hoover v. McChesney, supra, in which appears the following language; on page 480:

> "But we submit that it is the exercise, not of an executive power, but of a judicial one, for an executive officer to exclude a citizen from the use of the mail because he, in the opinion of the executive office, at some time previously or

then had been or was violating the law by using the mail in an improper manner by sending non-mailable matter, unless the right to use the mail be a mere 'privilege or gratuity' which may be given or refused at the will of those who control the postal service.

"It is not to be overlooked that the establishment of the postal service and its operation is the exercise of a Governmental function; that the money which pays for this perfect postal system is raised by the postage charged, and all deficits paid out of the common treasury of the United States; that it is a monopoly which excludes not only the States, but all individuals, and that it has become a part of the business operations of the citizens of the United States, and an indispensable part in some kinds of business; and that this right to the use of the mails by sending and receiving mail is a most valuable one to the citizens, and one the depriving of which would destroy the business and the living of very many of the citizens of the United States. This postal monopoly, if granted and exercised by a citizen or a corporation, would, from the fact of its being a monopoly, make it imperative that all persons who paid the postal rates and conformed to the reasonable regulations of the postal service should have a common right to the use of the mails, and that because of the fact of the monopoly thus granted. This right would be protected in the courts if the citizen or the corporation controlling the postal service should attempt to deprive him of it. If the United States Government should hereafter become the owner of all the transportation lines in the United States, and thus the common carrier of the nation, and by law exclude all others from becoming common carriers, it would seem to follow inevitably that the citizens of the United States would have a common right to travel and ship freight over the lines thus owned and operated by the United States, and that all of its citizens, subject to such general laws and regulations as to rates and the operation of the lines as might be enacted and established, would have this common right, and that such a right would be readily recognized as a property right in the citizen, and one of which a particular citizen could not be deprived except by due process of law. We think the right to the use of the mails, though in degree much less valuable than the use of the transportation lines, would be equally a property right, and one which could not be taken away except by due process of law."

This position is sustained strongly in the case of *Nat'l. Ry.*

Pub. Co. v. Payne, 29 App. D. C. 203, in which the right to the use of the mails is unequivocally declared a valuable right and a property right, from which decision no appeal was taken by Postmaster General Payne.

That such right is not a mere privilege and gratuity, but is a property right, is finally determined in the case of *Magnetic School of Healing v. McAnnulty, supra,* which quotes the *McChesney* case with approval as to property right. Clearly it must be so. The postoffices and postroads which were the subject of a charter grant in the colonies, later during the federation became by the Constitution a Federal function. The statutes of the United States make that vehicle and agency of social and business intercommunication a *monopoly* of the Federal Government administered by the *Postmaster General.* Of only secondary consequence in its early history, the right of the mails has become as vital to every interest in the nation, not only to newspapers and periodicals, but to every commercial organization which operates within our boundaries, as is the breath or the blood of the body to the maintenance of life. The withholding of the right to use the mails involves a power to make or destroy any measurable commercial or journalistic institution in the United States. No casuistry or indirection or argument can change this fact.

The conception of the right to the mails as a mere gratuity or license, subject to the arbitrary determination of the Postmaster General, which respondent declares is not subject to review by the courts, is on all fours with the effort made to treat the right of an attorney to practice law as a mere gratuity and license, which position was for all times negatived in the case of Ex Rel. Garland, 4 Wall 333. The position that such right may be treated as a mere gratuity is expressed in both the cases of In re Jackson, 96 U. S. 727 and In re Papier, 143 U. S. 110, in discussing subject matter involving an attempt to conduct lotteries, both of which cases antedated the McAnnulty case.

Tucker on Consitutional Law, Sec. 326, p. 669, says, after discussing the rules sought to be established in the Rapier and Jackson case:

"The case rests simply upon the propriety right of Congress in the mails. It may well be objected that this in-

terpretation of the court is not consistent with its purpose. If the postal power and duty be conferred as an essential facility for the transmission of written and printed intelligence; if without postal facilities the press of the country as the media of information, political or otherwise, be diverted from the mails; if Congress refrains from the use of this postal power and duty so as to interfere with the publication of newspapers and other printed matter, is it not an abridgement of the press by refraining from the exercise of power and the non-performance of public duty just as great as if it absolutely prohibited the transmission? The author therefore would consider this question disconnected with an immoral or criminal use of the mails as an open question for reconsideration by the court."

The only case in the United States we have found raising squarely the constitutionality of an attempt by a legislature to foreclose the right of free press by the suppression of a newspaper, where it at once involved a public right and the enjoyment of a free press, was the State decision in the case of ***Ex parte O'Neill, 22 S. W. 923;*** 40 Amer. State Rep. 776, in which the court said:

"The power to prohibit the publication of newspapers is not within the compass of legislative action in this State, and any law enacted for that purpose is clearly in derogation of the bill of rights (substantially same as federal constitution). The power to suppress, one paper concedes the power to suppress all, whether such publications are political, secular, religious, decent or indecent, obscene or otherwise."

It is a persuasive decision.

POSTMASTER GENERAL WITHOUT JURISDICTION.

The jurisdiction of the Postmaster General to determine the admissibility to the mails of matters in violation of fraud orders is founded upon a statute which authorizes the exclusion of such matter upon evidence "satisfactory to him." Sec. 3929, Gen. States Trading-with-Enemy Act confers specific jurisdiction on the President. The only other authority he could have in the instant case is an implied authority from the general terms of the statute authorizing him to exercise the general administration of the affairs of the Department. It is significant that nowhere

in the Espionage Law is there any specific delegation of power to the Postmaster General to determine the mailability or non-mailability of relator's publication, or of any other publication referred to in the bill. It is significant that there is an absence of any empowering provision in the Espionage Law. The violation of law prerequisite to be determined, even if it is assumed that Section 3 of Title I has reference in any way to the mails (of which more hereafter) involves in every instance the commission of the most serious felonies, except murder, capable of commission. It is entirely reasonable to assume that the provision concerning the admissibility to the mail, grounded upon felonies of such serious consequence, were intended to become operative; 1st, by a formal judicial process, or 2d, after a conviction of one of the felonies enumerated.

It was held in the Nat'l Pub. Co. v. Payne, ***supra,*** and in the McAnnulty case, ***supra,*** that the attempted acts of the Postmaster General were ***ultra vires*** and of no valid import. It is incredible that Congress intended to commit so overwhelming a responsibility to an administrative officer or his subordinate in a proceeding having none of the attributes or characteristics of a trial of orderly judicial determination.

Daniel Webster defines a judicial hearing as follows:

> "By the law of the land is most clearly intended the general law,—a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen should hold his life, liberty, and property and immunities under the protection of the general rules which govern society. Everything which may pass under the form of enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature."

The absence of a judicial proceeding stands out in clear and bold relief in the argument of Jeremiah Black in the ***Milligan case, 71 U. S. (Wall) 2.***

The incidents of a real hearing are further set forth in ***Lewis Pub. Co. v. Wyman, 152 Fed., 787,*** at 797:

> "It is therefore impossible to sustain the contention that the order revoking the second-class privilege of complainant was based upon the hearing had in June, 1905, and as it is indisputed that at the hearing had on April 30, and May 1, 1906, complainant was advised that this matter would not be taken up then, but that he would be notified thereafter when to appear for a hearing on that issue, and it never has been so notified, it is impossible for the court to make a finding that there had been any hearing on this issue, within the meaning of the law.
>
> "This conclusion makes it unnecessary to determine whether it is essential in order to constitute a hearing under the act of March 3, 1901, that the publisher be either confronted with the witnesses whose testimony is to be used against him or that he be at least furnished their tesimony and names in order that he may be able to rebut their evidence, if it is possible for him to do so."

Mere appearances in response to process by the relator does not confer jurisdiction upon the Postmaster General, and in no way estops the denial by relator that a hearing was had, for it is a fundamental rule of law that even a voluntary appearance cannot create jurisdiction unless jurisdiction obtains by positive warrant.

Forniquet v. Perkins, 7 How., 160; 12 Law. Ed. 650.

It is true that Congress under the Constitution has the power to create courts of inferior jurisdiction, but by the maddest interpretation of the court in conjunction with the guaranty of due process of law, it will not be said that the pretended hearing before the Third Assistant Postmaster General of the United States, as it appears from the pleadings in this case, complied with even the most primitive requirements of judicial justice. The Postmaster General sits in judgment on the case; he is the prosecutor of the case. There are no pleadings in the case. There was declined even the privilege of having an oral statement by way of a bill of particulars as to what matter it was alleged violated any certain provision of Postal Regulations 481½. No right was provided at the trial of the issues of fact by a jury, which is a constitutional requirement for proof of the

crime of treason; no presentment by a grand jury. The ***plain fact*** of the matter is that a ***citation*** is ***equivalent*** to ***conviction,*** and that the proceeding by which it was pretended to assert the right to strike down not only valuable property rights, developed through years of struggle, as well as the right of the public to keep open the channels of public communication, more broadly stated as a fundamental right of free speech and a free press, is a ***grotesque substitute*** for due process of law. The proceeding was not even dignified by a representative from the Department of Justice, nor by the personal presence of the Postmaster General himself. The record shows the submission of articles, for example, disapproving the Draft Law, all of which preceded the passage of the Draft Act, and coupled with this is the proffer of the general files of the paper covering thousands of pages of printed matter, without so much as definite and specific reference to any matter therein relied on to make proof. It shakes every sense of what is constituted democracy to assume that matters of this consequence were intended by the Espionage Act to be submitted to the tender mercies of a proceeding of this nature, and at a time when the judge and prosecutor represented in the same person, are inevitably subject to the stress and passionate sentiment of the hour.

It is therefore the position of the relator: 1st, ***that Congress did not intend to delegate the exercise of the judicial power involved to the Postmaster General;*** 2d, ***that if Congress did intend to delegate such power to the Postmaster General, it was an attempt to invade the judicial department of the Government, and was a delegation of power in violation of the Constitution.***

FREEDOM OF SPEECH.

Article 1 of the Bill of Rights provides:

> "Congress shall make no law * * * abridging the freedom of speech or of the press."

Abridging is defined in the standard lexicons as meaning any curtailment or limitation upon a right. There are two logically different conceptions of the meaning of the right of free speech; one is that free speech shall be permitted only after subjection to a censorship or other ***preventive*** or prohibitive ***pre-***

liminary license; the other is, as voiced in our Constitution and in the Constitutions of all the States, the free enjoyment of the right of free speech and the unlimited right to the use of the printed page, subject only to punishment for the ***abuse*** of such right, which abuse is referred to often in the older texts as the "licentiousness of the press." This censorship of the press was first inflicted by the Church, and later by the State in England. The State censorship was exercised under a licensing act up to 1695, after which time it ceased entirely.

Says Dicey on "Law of the Constitution," page 259:

> "The refusal of the English Parliament in 1695 to renew the Licensing Act did permanently establish the freedom of the press in England. The fifty years which followed were a period of revolutionary disquiet fairly comparable with the era of the Restoration in France. But the censorship once abolished in England was never revived, and all idea of restrictions on the liberty of the press other than those contained in the law of libel have been so long unknown to Englishmen, that the rare survivals in our law of the notion that literature ought to be controlled by the State appear to most persons inexplicable anomalies and are tolerated only because they produce so little inconvenience that their existence is forgotten."

This right in England, as Schroeder sets forth in his work, "Obscene Literature and Constitutional Law," is not due to an affirmative act of Parliament, but has been uniformly exercised as a privilege by permission which could be "exercised with impunity in spite of parliamentary enactments to the contrary."

The only interference with this right in England has been to redress private wrongs suffered as a result of a publication by punishment if the violation amounted to a crime by the State.

So in this country under the Constitution there can be but one sound construction as to the intended freedom of speech and of the press which was to be enjoyed under the Bill of Rights. It is interesting to observe that even in the government of our colonies there was no infringement of the right of free speech, and the Declaration of Independence, reciting the wrongs suffered by the colonies will be searched in vain to find protest against such wrong.

The alien and sedition laws which lived their allotted hour, expiring by limitation in the year 1801, are the one illustration of the attempt by Congress or the executive to abridge the freedom of the right of speech in this country. President John Adams, irritated by the open discussion and criticism of his administration, fathered the enactment of those laws. One need but review in Wharton State Trials, the trial of the defendants Lyon, or Fries, or Cooper, to learn the gross intolerance which followed upon the passage of the sedition act, to the most modest critics of the administration. The sedition acts were directly responsible for the retirement from power of the greatest political party in the history of the Republic—the Federal Party—which had constructively builded the Government. For 115 years, in time of calm or time of storm, no effort was made to rear again the head of this autocratic power until the Espionage Bill became law on the 15th of June, 1917. The sedition law never reached the Supreme Court of the United States, so that tribunal might determine its constitutionality, but as Story says in his work on the Constitution, its unconstitutionality may have been said to have been determined by the universal reprobation of the people of this country.

> "The sedition act was in the highest degree impolitic, and as the prosecutions under it showed, was susceptible of being used for purposes of oppression and intimidation."
>
> Story on Constitution, Vol. 2, Sec. 1293-4.
>
> See note Vice-President Calhoun to Gov. Hamilton, Aug. 28, 1832.

Says Blackstone:

> "To subject the press to the restrictive power of a licenser as was formerly done before and since the revolution (1688) is to subject all freedom of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion and government."

Tucker in his text on Blackstone Commentaries, even contended that discussion of measures of government are never punishable.

In May's Constitutional History, C. 10, it is said:

> "When the press errs, it is by the press itself that its errors are left to be corrected. Repression has ceased to be the policy of rulers, and statesmen have at length fully realized the wise maxim of Lord Bacon, that "The punishment of wits enhances their authority, and a forbidden writing is thought to be a certain spark of truth that flies up in the faces of them that seek to tread it out.'"

One but need read the text of the Virginia and of the Kentucky resolutions, one need but review Madison's report of January, 1800, to see the peril and menace inseparable from an attempt to license and censor the press by arbitrary delegation of power. Madison branded it as unconstitutional upon the ground that it abridged the freedom of speech and of the press.

Says Tucker:

> "To abridge the right of the citizen to discuss orally or in writing and by publication the public acts of the Government and its agents and the attempt to screen themselves from censor by such a law as the sedition law would seem to be clearly within the prohibition of this clause of the Constitution to need further comment. If such law is constitutional, to what can this amendment as to the freedom of speech or of the press look for protection against the powers of Congress?"

Says Cooley:

> "Repression of full and free discussion is dangerous in any government resting upon the will of the people. The people cannot fail to believe that they are deprived of rights and will be certain to become discontented when their discussion of public matters is sought to be circumscribed by the judgment of others upon their temperance or fairness. They must be left at liberty to speak with the freedom which the magnitude of the supposed wrongs appears in their minds to demand, and if they exceed all the proper bounds of moderation, the consolation must be that the evil likely to spring from the violent discussion will probably be less, and its correction by public sentiment more speedy than if the terrors of law were brought to bear to prevent the discussion."

No homlier philosophy or sound common sense exists in the public thought of this country than that expressed by Benjamin Franklin. Said Franklin:

"Freedom of speech is a principal pillar of a free government; when this support is taken away, the Constitution of a free society is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular examination into the actions of magistrates. This privilege in all ages has been and always will be abused. The best of men could not escape the envy and the censor of the times they lived in. Yet this evil is not so great as it might appear at first sight. A magistrate who aims at the good of society will always have the inclination of a great majority on his side and all posterity will not fail to render him justice. The abuses of the freedom of speech are the excesses of liberty. They ought to be repressed; but to whom do we commit the care of doing it? An evil magistrate entrusted with power to ***punish for words*** would be armed with a weapon the most destructive and terrible. Under pretense of pruning off the exuberant branches he would be apt to destroy the tree."

Cooley declares in his Constitutional Limitations, 604, that the purposes of the guaranties was "to guard against repressive measures by the several departments of the Government by means of which persons in power might secure themselves from just scrutiny and condemnation." This is the unanimous voice of the writers. ***But*** it may be said that the provisions of the Espionage Bill are not a re-enactment of the provisions of the Sedition Law. In fact, in response to a resolution offered in the Senate of the United States by Senator Hardwicke and in the House of Representatives by Congressman Moon, the Postmaster General made reply on the 21st day of July, 1917, as to what action had been taken by the department in this behalf. It is admitted in the communication from the Postmaster General that postmasters under the professed authority of the Act had been instructed to hold publications at the postoffice and thereupon to notify the Postmaster General. In his communication he assures Mr. Moon that the cases are being disposed of as quickly as possible. The Postmaster General declined certain information in regard to his activities upon the ground that public interest precludes a disclosure to Congress, and adds as follows:

"In the administration of this law nothing has been done by this department to suppress free criticism, right or

wrong, of the Government, nor has the department attempted in any way to interfere with the legitimate expression of views which do not coincide with those of the Government in the matter of the war with Germany or any other matter."

And then adds this significant statement, which I ask the Court to especially mark:

"I will state generally with respect to the action of the department that no newspaper or periodical has been denied the privilege of the mails as such. Particular issues of certain publications have been found to contain matter which would interfere with the operation or success of the military * * * and therefore non-mailable under the act in question. Publishers have been so advised whenever they have asked the department for the reasons for declaring their publications non-mailable."

It will be remarked further in this connection that the Postmaster General of the United States, in so far as relator has knowledge, has issued orders to show cause why the certain publication in question should not be denied the right of ***second-class*** mail rating, and has not purported to exclude from the rights to the ***other*** classes of the mails, the publication in question. This is a manifest admission of consciousness by the Postmaster General that the Espionage Act in question delegates to him no specific or implied authority to act. It is an attempt to avail himself of the provisions of the statute, which apparently delegate a general power to him, when the second-class privilege has once been accorded to a paper, to grant a hearing, and upon such hearing to revoke the right of said second-class mail rating, for non-compliance with statutory requirements for second-class right.

The Espionage Law provides for no tribunal to determine the second-class privilege or rating of a publication. It provides that the violation of the Espionage Act shall make ***non-mailable*** any publication violating the provisions contained in the Act. The proceeding is manifestly an effort to ***hook on***, by obvious straining, to the jurisdiction here referred to, in order to invest himself with a pretended jurisdiction to pass upon the mailability or non-mailability of matter referred to in the Es-

pionage Act. And to the extent that his decision is made, it inflicts upon the relator the pains and penalties of commercial ruin, for which no reparation or redress is open to him in the tribunals of this country, except in the instant proceeding before your Honors. But the imposition to such pains and penalties does not exhaust the jeopardy to which he is exposed, for if he has committed any of the violations defined in the Act, he is still subject to the heavy pains and penalties defined for each offense referred to in the Act.

On the 6th day of October, 1917, there became law the "Trading-with-Enemy" Act, passed by the same Congress, the 65th Congress, which had passed the Espionage Bill, and in Section 19 of said Act, referring throughout its entire text to foreign publications, there is embodied the following language:

> "It shall be unlawful for any person, firm, corporation or association to transport, carry or otherwise publish or distribute * * * or to transport, carry or otherwise publish or distribute any matter which is made non-mailable by the provisions of the Act relating to Espionage, approved June 15, 1917."

It is interesting in passing to observe that this Act does provide in certain administrative restrictions placed upon the foreign language papers of the United States, the power in the President to act "upon evidence satisfactory to him," which nowhere appears in the Espionage Act. This provision of the Trading-with-the-Enemy Act is in ***pari materia*** with the section of the Espionage Act relating to non-mailability.

> "All consistent statutes which can stand together, though enacted at different dates relating to the same subject, and hence briefly called statutes in ***pari materia***, are treated perspectively and construed together as though they constituted one act, whether at same or different dates, same or different sessions; more strongly so if passed at the same session. Even if no reference is made to one another, it is presumed that acts at the same session are imbued by the same spirit and actuated by the ***same policy***, and should be construed in light of one another."

Louis Sutherland on Statutory Construction; Vol. 2, page 884; Sec. 443.

Manifestly the provision of the Trading-with-the-Enemy Act is as if it were a section immediately coupled with the non-mailability provision of the Espionage Act. This means that the findings of the Postmaster General declaring a publication to be non-mailable in this proceeding makes it illegal for that publication to transport its publication by any other sort of vehicle of transportation. This Congress cannot do. It is clearly an attempt to place an unconstitutional restriction upon the public press of the country.

The enactment on March 16, 1918, of the so-called Sedition Act confirms this position and shows that the Espionage Act of June 15, 1917, the Trading-with-the-Enemy Act of October 6, 1917, and the Sedition Act of May 16, 1918, are all in ***pari materia*** and should be considered as correlated.

See In re Jackson, 96 U. S. 727, and in re Rapier, 143 U. S. 110, in which the question is conclusively determined that the attempt of the Postmaster General or of Congress, acting through the respondent, to close all avenues of communication or transportation to a newspaper ***is without warrant of law and unconstitutional.*** In fact, in both these cases the sole ground alleged for sustaining the constitutionality of the restriction of Postmaster General to the transmission of lottery advertisements through the mails, is the fact that freedom of speech is ***preserved*** because there are kept open other avenues of communication, and the language is plain that ***if*** the undertaking is made to ***close*** them that the act is unconstitutional.

REFUSAL OF COURT TO REVIEW, DESTROYS FIRST AMENDMENT TO THE CONSTITUTION.

If this Court should find that the decision of the Postmaster General is not subject to review, or sustained on review, it would mean that unless the newspapers of the country act immediately upon decision of the respondent being made, they would be subject: 1st, to the additional penalties imposed by the Trading-with-the-Enemy Act; and thus thrice destroyed and thrice shriven. It is offensive to the spirit of America; it is resented by the free men of this land. It is a surrender to the unfortunate

temptation which in time of stress drives those possessed of temporary power to the exercise of autocratic rule, in order to bend all public and private opinions and sentiment to accord with their own. The *exercise* of this power finds no parallel anywhere among the civilized powers of the earth.

It is in precisely such times as this, when the legislative and executive branches of the government are concerned with the dynamic business of making a successful war that there must be invoked that solemn responsibility of the courts, set aside from the passion and the fury of the fray. Here reposes calmness; here reposes perspective and vision; here reposes the power to weigh those things that affect not only the immediate problems of government, but concern the preservation of the foundations of democracy, embodied in the Constitution. The problem is not one here of whether some patent medicine man fraudulently uses the mails for a vehicle; some lottery crook seeks to abuse the privilege of a preferential right; or a matter of petty and sordid consequence. The question is whether there will be written down now for all time the abrogation by the courts of the land of the guaranties of the First and Fifth Articles of the Bill of Rights; whether it will be written down that the guaranty of free speech and of a free press shall be denied the right of that protection in the courts of the land guaranteed by the Fifth Article of the Bill of Rights, declaring that no liberty or property of a citizen shall be taken without due process of law.

COMPULSIVE NECESSITIES OF WAR.

It is urged that a state of war creates a compulsive necessity under the stress of which surrender of liberty and privilege must be made by the citizen to the requirements of government and the business with which it is engaged. The phrase "Compulsive necessity" will be found, for example, in the decision of Judge Learned Hand of the Eastern District of New York, where it is somewhat discussed in the case against *The Masses* arising under the Espionage Act. Your relator asserts that the judicial rule governing the preservation of the constitutional guaranties, and all of them, is entirely unrelated to the circumstance of peace or war; that the Constitution provides specifically the provisions

touching the right of ***habeas corpus,*** and the provision regarding judicial status in naval or occupied territory or in time of open rebellion. Neither have any proximate or remote relation to the the rights and issues in this proceeding.

The historical setting in the case of ***In re Milligan, 71 U. S. (Wall) 2,*** following immediately the impassioned excitement of the great rebellion, in which there appeared for Milligan, David Dudley Field, Jeremiah Black and James A. Garfield, both in the argument of counsel and in the decision of the court, is such as to give to the decision and to the intrinsic value of the argument of counsel, a value in point of sanctity and solemnity rarely proclaimed by the courts of the nation. Relator rejects the temptation to revamp, to paraphrase and to plagiarize the classically expressed argument and decision in that case by extending here at length the portion of the argument of Jeremiah Black.

Says the Court on page 63:

> "We all know that it was the intention of the men who founded this Republic to put the life, liberty and property of every person in it under the protection of a regular and permanent judiciary, separate, apart, distinct, from all other branches of the Government, whose sole and exclusive business it should be to distribute justice among the people according to the wants and needs of each individual. It was to consist of courts, always open to the complaint of the injured, and always ready to hear criminal accusations when founded upon probable cause; surrounded with all the machinery necessary for the investigation of truth, and clothed with sufficient power to carry their decrees into execution. In these courts it was expected that judges would sit who would be upright, honest and sober men, learned in the laws of their country, and lovers of justice from the habitual practice of that virtue; independent, because their salaries could not be reduced, and free from party passion, because their tenure of office was for life. Although this would place them above the clamors of the mere mob and beyond the reach of executive influence, it was not intended that they should be wholly responsible. For any willful or corrupt violation of their duty, they are liable to being

impeached; and they cannot escape the control of an enlightened public opinion, for they must sit with open doors, listen to full discussion and give satisfactory reasons for the judgments they pronounce. In ordinary tranquil times the citizen might feel himself safe under a judicial system or organization.

"But our wise forefathers knew that tranquility was not to be always anticipated in a republic; the spirit of a free people is often turbulent. They expected that strife would rise between classes and sections, and even civil war might come, and they supposed, that in such times, judges themselves might not be safely trusted in criminal cases—especially in prosecutions for political offenses, where the whole power of the executive is arrayed against the accused party. All history proves that public officers of any government when they are engaged in a severe struggle to retain their places, become bitter and ferocious, and hate those who oppose them, even in the most legitimate way, with a rancor which they never exhibit towards actual crime. This kind of malignity vents itself in prosecutions for political offenses, sedition, conspiracy, libel and treason and the charges are generally founded upon the information of spies and delators, who make merchandise of their oaths and trade in the blood of their fellow men. During the civil commotions in England, which lasted from the beginning of the reign of Charles I to the Revolution of 1688, the best men, and the purest patriots that ever lived, fell by the hand of the public executioner. Judges were made the instruments for inflicting the most merciless sentences on men, the latchet of whose shoes the ministers that prosecuted them were not worthy to stoop down and unloose. Nothing has occurred ,indeed, in the history of this country to justify the doubt of judicial integrity which our forefathers seem to have felt. On the contrary, the highest compliment that has ever been paid to the American bench is embodied in this simple fact, that if the executive officers of this Government have ever desired to take away the life or the liberty of a citizen contrary to law, they have not come into the courts to get it done, they have gone outside of the courts, and stepped over the Constitution, and created their own tribunals. But the framers of the Constitution could act only upon the experience of that country whose history they knew most about, and there they saw the ferocity of Jeffreys and

Scroogs, the timidity of Guilford, and the venality of such men as Saunders and Wright. It seems necessary, therefore, not only to make the judiciary as perfect as possible, but to give the citizen yet another shield against his government. To that end they could think of no better provision than a public trial before an impartial jury."

And again on page 75:

"But we shall be answered that the judgment under consideration was pronounced in time of war, and it is, therefore, at least, morally excusable. There may, or there may not, be something in that. I admit that the merits or demerits of any particular act, whether it involves a violation of the Constitution or not, depend upon the motives that prompted it, the time, the occasion and all the attending circumstances. When the people of this country come to decide upon the acts of their rulers, they will take all these things into consideration. But that presents the political aspect of the case, with which we have nothing to do here. I would only say, in order to prevent misapprehension, that I think it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times, our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage, and goes surging up against the barriers which were made to confine it, then we need the whole strength of an unbroken Constitution to save us from destruction.

"There has been and will be another quasi-political argument—necessity. If the law was violated because it could not be obeyed, that might be an excuse. But no absolute compulsion is pretended here. These commissioners acted at most, under what they regarded as a moral necessity. The choice was left them to obey the law or disobey it. The disobedience was only necessary as means to an end which they thought desirable; and now they assert that though these means are unlawful and wrong, they are made right, because without them the object could not be accomplished; in other words, the end justifies the means. There you have a rule of conduct denounced by all law, human and divine, as being pernicious in policy and false in morals.

"Nothing that the worst men ever profounded has produced so much oppression, misgovernment and suf-

fering as this pretense of State necessity. A great authority calls it the tyrant's plea; and the common honesty of all mankind has branded it with infamy." And again on page 78:

"That class of jurists and statesmen who hold that the trial by jury is lost to the citizen during the existence of war, must carry out their doctrine theoretically and practically to its ultimate consequences. The right of trial by jury being gone, all other rights are gone with it; therefore a man may be arrested without an accusation and kept in prison during the pleasure of his captors; his papers may be searched without a warrant; his property may be confiscated behind his back, and he has no earthly means of redress. Nay, an attempt to get a just remedy is construed as a new crime. He dare not even complain, for the right of free speech is done with the rest of his rights. If you sanction that doctrine, what is to be the consequence? I do not speak of what is past and gone; but in case of a ***future war*** what results will follow from your decision indorsing the Attorney General's views? They are very obvious. At the instant when the war begins, our whole system of legal government will tumble into ruin, and if we are left in the enjoyment of any privileges at all we will owe it not to the Constitution and laws, but to the mercy or policy of those persons who may then happen to control the organized physical force of the country.

"This puts us in a most precarious condition; we must have war often, do what we may to avoid it. The President or the Congress can provoke it, and they can keep it going even after the actual conflict of arms is over. They could make war a chronic condition of the country, and the slavery of the people perpetual. Nay, we are at the mercy of any foreign potentate who may envy us the possession of those liberties which we boast of so much; he can shatter our Constitution without striking a single blow or bringing a gun to bear upon us. A simple declaration of hostilities is more terrible to us than an army with banners.

"To me the argument set up by the other side seems a delusion simply. In a time of war, more than at any other time, Public Liberty is in the hands of the public officers. And she is there in double trust; first, as they are citizens, and therefore bound to defend her, by the

common obligation of all citizens; and next, as they are her special guardians. The opposing argument, when turned into its true sense, means this, and this only: that when the Constitution is attacked upon one side, its official guardians may assail it upon the other; when rebellion strikes it in the face, they make take advantage of the blindness produced by the blow, to stab it in the back.

"The Convention when it framed the Constitution, and the people when they adopted it, could have had no thought like that. If they had supposed that it would operate only while perfect peace continued, they certainly would have given us some other rule to go by in time of war; they would not have left us wander about in a wilderness of anarchy, without a lamp to our feet, or a guide to our path."

And again on page 84:

"But while they are powerless to do good they may become omnipotent to trample upon innocence, to gag the truth, to silence patriotism and crush the liberties of the country. They would be organized to convict, and the conviction would follow the accusation as surely as night follows the day. A government, of course, will accuse none before such a commission except those whom it predetermines to destroy. The accuser can choose the judges, and will select those who are known to be ignorant, unprincipled and the most ready to do whatever may please the power which gives them pay and promotion. The willing witness could be found as easily as the super-serviceable judge. The treacherous spy and the base informer would stock such a market with abundant perjury; for the authorities that employ them will be bound to protect as well as reward them. A corrupt and tyrannical government, with such an engine at its command, would shock the world with the enormity of its crimes."

The doctrine presented by Jeremiah Black was adopted by the Court in brave and unmistakable language. The general contention of the Government in that case was the contention of military necessity, to sustain which various exaggerations

of judicial power as exercised were sought to be established; all rejected by the Court. Said the Court, on page 125:

> "This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and human rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to free-men. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of ***habeas corpus***.
>
> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men (founders of the Constitution) foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of Constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United Sates is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine, involving more pernicious consequences,

> was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."
>
> Opinion, in re Milligan, 71 U. S. Wall. 2.

In re Kemp, 16 Wis., 416, after courageously declaring limitations upon the executive use of the right of ***habeas corpus,*** and expressing the fear of the excesses which might be arrogated to the executive, Paine, J., said:

> "I should regard the establishment of that doctrine as a settled principle of our law, as a calamity little, if any, less to be deplored than the success of the rebellion."

It is interesting in this behalf to call attention to the historical review of the incidents similar to those in the Milligan case, by S. S. Coxe, in his work entitled "Three Decades," as it is also interesting to review the characterization of James G. Blaine in commenting on the treatment accorded to Judge Stone during this same period, because no one will impeach the sterling integrity and loyalty of James G. Blaine, who reviews with trenchant and firm condemnation the excesses to which the passion and fury of war had driven the constituted authorities in the subversion of the constitutional guaranties during that period. So deep was the resentment that in 1862 it was only by chance circumstance that President Lincoln was able to serve a Congress favorable to the administration and in a territory that was whole-heartedly committed to the war and firmly and loyally engaged in holding up the hand of the administration.

It is contended now that anyone who discussed the wisdom or unwisdom of the war is destroying the morale of the people and of the army, and thereby committing an offense in some manner vaguely within the twilight field of offenses defined and referred to in Section 3 of Title I of the Espionage Act. It was common to assert that during the progress of war it is not reasonable

to discuss the ways and means with which the war is being conducted by the constituted authorities of the Government, or to discuss the objective of the war, that is to say, the proper time for the consideration of the procuring of peace, or the conditions upon which various citizens may believe peace could be honorably secured and accepted by this country. The exaggeration of this angle of views has led to a wholesale destruction of the right to assemble and petition in the various portions of the country, with the apparent approval, or at least no expression of disapprobation and condemnation from the constituted authorities. In short, there was sought to be established a basis precluding public discussion which can be founded only upon the assumption of infallibility in action by the Government. This is subversive of the most valuable right, not only to the freedom of the citizen, but would mean the establishment of a principle which would withhold and deny from the Government the illuminating value of adverse criticism. The friend who approves of and criticises nothing in one's conduct is the useless and in the end the base friend. The friend who meets with level glance and frankly and fearlessly expresses disapproval or criticism of conduct is the enduring, the useful and the resolute friend. So is it in government. It has ever been the bane of autocracy and of kingly tyranny that the monarch was surrounded with fawning sycophants, fearful of betraying a difference of opinion, and ever anxious to bend the pregnant hinges of the knee.

During the Mexican War, while the country was engaged in hostilities, Lincoln, Sumner, Clay, Webster and other mighty figures of that day, both on the floor of Congress and in the public forums of the nation, denounced the war, both as to its purposes and its conduct, and all survived to enjoy the sound approval and admiration of their countrymen. It has been so through all the history that ever the "fathers stoned the prophets, while the sons, they blessed their bones."

Lincoln, in 1848, during the Mexican War, before the House of Representatives in opposition to that war, said:

> "At its beginning, General Scott was by this same President driven into disfavor if not disgrace, for intimating that peace could not be conquered in less than

three or four months. But now, at the end of twenty months * * * this same President gives a long message, without showing us that as to the end he himself has an even imaginary conception. As I have said, he knows not where he is. He is a bewildered, confounded, and miserably perplexed man. God grant he may be able to show there is not something about his conscience more painful than his mental perplexity."

The Mexican War was declared on the 11th day of May, 1846, and Daniel Webster, on the 6th day of November, 1846, at Faneuil Hall, Boston, in a public speech, said:

"The Mexican War is universally odious throughout the United States, and we have yet to find any Sempronius who raises his voice for it."

And on September 29, 1847, he further said:

"We are, in my opinion, in a most unnecessary and therefore a most unjustifiable war. I hope we are nearing the close of it. I attend carefully and anxiously to every rumor and every breeze that brings to us any report that the effusion of blood, caused, in my judgment, by a rash and unjustifiable proceeding on the part of the Government, may cease."

Said Clay on the 13th of November, 1847:

"Must we blindly continue to conflict, without any visible object, or any prospect of a definite termination? * * * It is the privilege of the people, in their primary assemblies, and of every private citizen, however humble, to express an opinion in regard to the purposes for which the war should be continued; and such expression will receive just so much consideration as it is entitled to, and no more."

He further offered the following resolution:

"***Resolved***, That we invite our fellow citizens of the United States, who are anxious for the restoration of the blessings of peace, or, if the existing war shall continue to be prosecuted, are desirous that its purposes and objects shall be defined and known, who are anxious to avert present and future perils and dangers, with which it may be fraught, and who are also anxious to produce contentment and satisfaction at home, and to elevate the national character abroad, to assemble to-

gether in their respective communities, and to express their views, feelings and opinions."

Charles Sumner, on November 5, 1846, said:

"The Mexican War is an enormity born of slavery. * * * Base in object, atrocious in beginning, immoral in all its influences, vainly prodigal of treasure and life; it is a war of infamy, which must blot the pages of our history."

Theodore Parker on June 7, 1846, said:

"But why talk forever? What shall we do? In regard to this present war, we can refuse to take any part in it; we can encourage others to do the same; we can aid men, if need be, who suffer because they refuse. * * *

"We can hold public meetings in favor of peace, in which what is wrong shall be exposed and condemned. It is proof of our cowardice that this has not been done before now. We can show in what the infamy of a nation consists; in what its real glory."

"With these doctrines for our guide, I will thank any Senator to furnish me with any means of escaping from the prosecution of this or any other war, for a hundred years to come, if it please the President who shall be, to continue it so long. Tell me, ye who contend that, being in war, duty demands of Congress, for its prosecution all the money and every able-bodied man in America to carry it on if need be, who also contend that it is the right of the President, without control of Congress, to march your embodied hosts to Monterey, to Yucatan, to Mexico, to Panama, to China, and that under penalty of death to the officer who disobeys him —tell me, I demand of you—tell me, tell the American people, tell the nations of Christendom, what is the difference between your American Democracy and the most odious, most hateful despotism, that a merciful God has ever allowed a nation to be afflicted with since government on earth began? You may call this free government, but it is such freedom, and no other, as of old was established at Babylon, at Susa, at Bactrina, or Persepolis. Its parallel is scarcely to be found when thus falsely understood in any, even the worse forms of civil policy in modern time. Sir, it is not so; such is

not your Constitution; it is something else, something other and better than this."

Speech of Sen. Thomas Corwin, Feb. 1847.

The foregoing extract will be found more fully amplified in the brief of Gilbert E. Roe, Esq., in the case of Masses Publishing Co. v. Thomas J. Patten, U. S. Circuit Court of Appeals.

The position of Lloyd George to the policy of the British Government in the Boer War is well remembered history, as follows:

"'The fact is that the war has been forced on us by a Government which has divided three millions of money among its own supporters by a measure carried by a Chamber composed of lords who benefit to the tune of hundreds of thousands of pounds.'"

DuParcq's Life of David Lloyd George; Vol. 2, pages 216 and 217.

"'He (Prime Minister) has led us into two blunders: The first was the war, but worse than the war is the change that has been affected in the purposes for which we are prosecuting the war. We went into the war for equal rights. We are prosecuting it for annexation * * * You entered into these two republics for philanthropic purposes, and remained to commit burglary.'"

Ibid, page 254.

The quotations hereinbefore referred to are recited specifically to show that, only the cowardly lack of true conception as to the right of free speech, but the ***duty*** of exercising that right has been challenged in times of supreme crisis by these great oustanding figures. They establish the precedent for courageous resistance to the intolerance and suppression now sought to be justified by the phrase "Compulsive Necessities of War."

* * *

QUESTION NOW BEFORE THE COURT IS MORE IMPORTANT THAN WAS INVOLVED IN MARBURY V. MADISON, THE DRED SCOTT DECISION, OR ANY OTHER QUESTION HEREOFORE

RAISED CONCERNING THE DESTINY OF DEMOCRACY IN AMERICA.

Attempt to Suppress by Injunction or Preventive Measure the General Issue of the Press Clearly Unconstitutional.

We have heretofore adverted to the two conceptions of the right of free speech; one claiming the right of preliminary censorship to the publication; the other denying such right of censorship, but restraining licentious abuse of the right by punishment.

Patterson v. Colorado 205 U. S., 467 (1907), the Court said:

> "In the first place, the main purpose of such constitutional provisions is to prevent all such previous restraints (italicized in the text of the opinion) upon publication as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. Citing Commonwealth v. Blanding, 3 Pick. 304, 313, 314. Republica v. Oswald, 1 Dallas, 319, 325. The preliminary freedom extends as well to the false as to the true, the subsequent punishment may extend as well to the true as to the false. This was the law of libel apart from statute in most cases, if not in all. Commonwealth v. Blandin, ubi sup. 4 Black Com. 150."

Reference to 3 Pick, 304, 314, discloses that that opinion adopted in the Patterson v. Colorado case by our Supreme Court contained after the words "practiced by other governments," as quoted in the Patterson v. Colorado case, the following language:

> "And in early times here, to stifle the efforts of patriotic towards all enlightening their fellow citizens upon their rights and the duty of rulers.
>
> "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse; like the right to keep firearms which does not protect him who uses them for annoyance or destruction."
>
> 3 Pickering, 304, 314.

So conclusively it appears that the Supreme Court of the United States has swept aside the pretended right of censorship

or restraint *previous* to publication, adopting the position which since 1688 has been the accepted law of England, as more fully appears in the earlier part of this brief, and establishes the doctrine that the only restraint upon the complete right of free speech and of a free press under the Constitution is the power of punishment for its licentious abuse after the publication has committed the abuse.

In the case of The Masses Publishing Co. v. Patten before the Circuit Court of Appeals in New York, the action of the Postmaster General had reference merely to a single copy, the August number of *The Masses*. In the proceeding now before the Court, the order of the Postmaster General seeks to establish a complete foreclosure and embargo upon all editions of The Milwaukee *Leader*, a plain affront and violation of the unquestioned doctrine established in Patterson v. Colorado. Clearly whatever disposition is made of the rejection of review of the action of the Postmaster General, this rule should entitle relator relief from the embargo upon the future issue of the paper, for which there is no color of warrant to sustain the action of the respondent. Relator is persuaded that the consciousness of this fact persuaded the reply on July 21st, 1917, of respondent to the resolution offered by Mr. Moon in the House of Representatives, denying that any attempt had been made to suppress any newspapers as such, but that the action of the Postmaster General had extended only to special editions of papers. And it is consciousness of this, moreover, that seems to have inspired the declination to indicate by bill of particulars the offense complained of by the papers cited by the Department, and to have inspired the general characterization, "Your files show a general tendency to be seditious." The action of respondent, therefore, is without warrant; it has already stigmatized relator's publication, has already visited upon it severe and irreparable pains and penalties; and if continued, threatens it with utter destruction.

On July 8, 1920, as this brief is written, the ban upon its right to second class mailing privileges is still denied to the Milwaukee Leader by the continuing order of the Postmaster General. This, in addition to the fact that for a continued period the first class mail of the Milwaukee Leader and its officers ad-

dressed to and from its place of publication were confiscated, while the ban was further extended to exclude the paper from the right to use the Express Companies for shipments, is a tyrannous and intolerable abuse of administrative power.

Dated October 13, 1920.

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